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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JEKE DEVON WEST, Defendant and Appellant.	D054137 (Super. Ct. No. SCE269030)

APPEAL from a judgment of the Superior Court of San Diego County, Charles W. Ervin, Judge. Affirmed.

A jury convicted defendant Jake West of the robbery (Pen. Code, § 211)[1] and kidnapping (§ 209, subd. (b)(1)) of Mr. Robinson, and found true the allegations that West committed each offense for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)) and personally used a firearm (§ 12022.53, subds. (b) & (e)(1)). The court

1 All further statutory references are to the Penal Code unless otherwise specified.

sentenced West to a prison term of 30 years to life. On appeal, West raises numerous challenges to the convictions.

I

FACTUAL BACKGROUND

Robinson had a side business selling clothing and sports memorabilia. On December 23, 2006, Charles Spencer[2] telephoned Robinson and asked about buying some of Robinson's merchandise. During a subsequent telephone call, they arranged to meet in a parking lot of a fast food restaurant in Spring Valley, California. However, when Robinson arrived at the arranged location, no one was there. After waiting approximately 15 minutes, Robinson began to leave, but he then received another telephone call asking him to return to the arranged location, and then received another telephone call asking him to meet the buyer in a nearby alley behind the Shadow Point Apartments.

Robinson drove to the alley. Two men (West and Spencer) appeared, approached Robinson and asked to see the items for sale. Robinson opened his car door to show them some of the items and, as he retrieved an item from the back seat of his car, West placed a gun to Robinson's head and said, "This is a jack" and, "We're taking all this shit." At some point, Robinson also heard West and Spencer refer to each other as "Blood" and heard West comment, "Blood, we taking all this shit."

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2 Spencer was charged with robbery in connection with the crimes. He pleaded guilty before trial and testified at West's trial.

West ordered Robinson to move away from the car to a nearby trash dumpster, and to get on the ground. He then ordered Robinson to empty his pockets, and took his cash and cellular telephone. West then left him on the ground and returned to Robinson's car. Robinson's position on the ground left him partially concealed by the dumpster and partially obscured his view of West and Spencer. However, Robinson could at times see West and Spencer take items from the car and go up the stairs. At one point, Robinson started to move away from the dumpster (both to see better and to place himself in a part of the alley where he could be seen in the event the robbers shot him), but West ran to Robinson with the gun and ordered him to "[g]et your ass back" to the original sitting place. After unloading the car, which took approximately 20 minutes, West told Robinson he could leave.

Spencer testified that he and West, along with Quintin Baker and other members of the Casa de Oro Bloods gang, met and planned the robbery of Robinson at the home of Mr. Campbell,[3] who lived at the Shadow Point Apartments. Baker conceived the robbery plan because he knew Robinson. West had a gun and they decided West, Spencer and Baker would meet Robinson. During the robbery, Spencer unloaded the car while West used the gun to keep Robinson quiescent. After they released Robinson, they

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3 The Casa de Oro Bloods gang was affiliated with another gang (the "Murder Krew") to which Campbell belonged. Campbell testified that Baker asked Campbell whether he would "want in on a lick" (a robbery) but Campbell said he was not interested. However, after the robbery was completed, West gave Campbell the gun, which Campbell cleaned and hid to help his fellow gang members avoid arrest. Campbell entered into a plea agreement pursuant to which he pleaded guilty to being an accessory to the robbery and admitted the crime was gang-related.

loaded the merchandise into cars driven by Baker and Spencer and drove to Spencer's home.

ANALYSIS

A. Substantial Evidence Supports the Aggravated Kidnapping Conviction

West first asserts that, although there is sufficient evidence to support a conviction for simple kidnapping under section 207, his conviction for aggravated kidnapping under section 209 must be reversed because there is insufficient evidence his movement of Robinson substantially increased the risk of harm beyond that inherent in the underlying robbery.

A person is guilty of simple kidnapping if he or she "forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county . . . ." (§ 207, subd. (a).) However, a person is guilty of aggravated kidnapping when he or she "kidnaps or carries away any individual to commit robbery . . . ." (§ 209, subd. (b)(1).)

"[T]here [exist] two distinct standards of asportation for kidnapping, depending on whether the kidnapping was for robbery (aggravated kidnapping) under section 209, subdivision (b) . . . , or was a simple kidnapping under section 207[, subdivision] (a). [¶] Kidnapping for robbery, or aggravated kidnapping, requires movement of the victim that is not merely incidental to the commission of the robbery, [but] which substantially increases the risk of harm over and above that necessarily present in the crime of robbery itself. [Citations.] These two aspects are not mutually exclusive, but interrelated."

(*People v. Rayford* (1994) 9 Cal.4th 1, 11-12, fn. omitted.) For simple kidnapping, however, the primary focus is on the movement itself and, although no specific distance is required, the jury must assess whether the victim was moved a distance that was substantial in character under all of the circumstances. (*People v. Martinez* (1999) 20 Cal.4th 225, 237-238.)

Because West challenges the sufficiency of the evidence on the asportation element, we outline the standards developed by our Supreme Court. "As for the first prong, . . . whether the movement is merely incidental to the crime of robbery, the jury considers the 'scope and nature' of the movement." (*People v. Rayford*, *supra*, 9 Cal.th at p. 12.) This includes consideration of both the actual distance the victim was moved (although there is no minimum number of feet a defendant must move a victim to satisfy the first prong) and the context of the environment in which the movement occurred. (*Ibid*.) "The second prong refers to whether the movement subjects the victim to a substantial increase in risk of harm above and beyond that inherent in robbery. [Citations.] This includes consideration of such factors as the decreased likelihood of detection, the danger inherent in a victim's foreseeable attempts to escape, and the attacker's enhanced opportunity to commit additional crimes. [Citations.] The fact that these dangers do not in fact materialize does not, of course, mean that the risk of harm was not increased. [Citations.]" (*Id*. at pp. 13-14.) Moreover, the increased risk of harm for the asportation element of kidnapping for the purpose of robbery is not limited to increased risk of physical harm, but may be satisfied if there was a "substantially increased risk of either physical *or* mental harm." (*People v. Nguyen* (2000) 22 Cal.4th

872, 885-886 [increased risk of harm includes mental, emotional or psychological harm from the asportation.])

West concedes the jury was properly instructed on the standards it was to apply, but asserts that under *People v. Timmons* (1971) 4 Cal.3d 411 the movement of Robinson in this case was (1) merely incidental to the robbery, and (2) any increased risk of harm from the movement was too de minimus to support the jury's guilty verdict. In *Timmons*, the defendant planned to rob two employees who delivered money from a bank to a market where they were employed. On the day of the robbery, the victims arrived at the market with the money from the bank and parked their car in the market's parking lot. (*Id*. at p. 413.) The unarmed defendant entered the car, told the victims it was a holdup, and directed the victim driver to drive out of the parking lot. As the driver slowly drove the car five blocks, defendant proceeded to rob the victims of the money they obtained from the bank. After securing the stolen money, defendant told the driver to stop and he got out of the car. (*Id*. at pp. 413-414.) In setting aside Timmons's conviction for kidnapping to commit robbery, the California Supreme Court held that "the movement [of the victims' vehicle] was 'incidental to the commission of the robbery.' [Citation.] The car was in fact the moving situs of the robbery in this case; its movement allowed Timmons to relieve the victims of their money with less danger of detection than if he had robbed them in a busy parking lot, and facilitated his escape by transporting the eyewitnesses to a place where it would be more difficult for them to raise an immediate alarm." (*Id*. at p. 414.) Additionally, the *Timmons* court noted the victims "simply drove their own car for some five blocks along a city street in broad daylight, while Timmons

accomplished the robbery . . . . The police were not in hot pursuit, and there was no high-speed chase and consequent reckless driving. On the contrary, it was to Timmons'[s] advantage that the car be driven as innocuously as possible so as to attract no attention from passersby. Neither victim observed any weapon in Timmons'[s] possession, and the court found he was not armed. . . . [N]either victim suffered any harm whatever. [¶] In the circumstances, this brief asportation may conceivably have increased the risk in some slight degree beyond that inherent in the commission of the robberies, but it cannot be said to have 'substantially' increased that risk." (*Id*. at pp. 415-416, fn. omitted.) In a footnote, the *Timmons* court acknowledged: "To avoid misunderstanding, we reiterate that in a different set of circumstances a movement of five city blocks might well 'substantially' increase the risk and thereby expose the robber to a prosecution for kidnapping." (*Id*. at p. 416, fn. 2.)

We conclude the *Timmons* rationale does not support reversal in this case. First, insofar as *Timmons* held that forcible substantial movement solely to facilitate the commission of the robbery must be deemed merely incidental to the commission of the robbery within the meaning of the first prong, the Supreme Court later clarified in *In re Earley* (1975) 14 Cal.3d 122 (*Earley*) that was not the test and acknowledged, to the extent *Timmons* held a five-block movement to be brief and incidental to the robbery, *Timmons* was impliedly overruled by *People v. Stephenson* (1974) 10 Cal.3d 652, in which the victim was forcibly moved five or six blocks, and *People v. Thornton* (1974) 11 Cal.3d 738 (overruled on other grounds by *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12), in which two victims were forcibly moved one block and four blocks,

respectively. (*Earley*, at p. 132, fn. 14.) Similarly, in this case there was substantial evidence to support the jury's finding that the forcible movement of Robinson "was not 'merely incidental to the commission of the robbery' [citation], even though it may have been solely to facilitate the commission of the robbery." (*Earley*, at p. 130, fn. omitted.) The fact West chose to move Robinson away from the car before completing the robbery "does not render the . . . asportation 'merely incidental' to the crime, for it is the very fact that defendant utilized substantial asportation in the commission of the crime which renders him liable to the increased penalty of section 209 if that asportation was such that the victim's risk of harm was substantially increased thereby. Clearly, any substantial asportation which involves forcible control of the robbery victim such as that occurring in this case exposes [him] to grave risks of harm to which [he] would not have been subject had the robbery occurred at the point of initial contact." (*Thornton*, at p. 768, fn. omitted.)

In *Earley*, the Supreme Court also distinguished *Timmons* on the "risk of harm" factor by noting that in *Earley*, "unlike *Timmons*, the victim observed what he believed to be a gun in the robber's hands, the robber expressly threatened to kill him, the victim did not have a companion with him, and the robber drove from a lighted intersection to dark side streets." (*Earley, supra*, 14 Cal.3d at p. 133, fn. omitted.) This case, like *Earley*, is distinguishable from *Timmons* on the "risk of harm" factor, which is "[t]he essence of aggravated kidnapping." (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1152.) Even assuming the increased risk of harm associated with the asportation must be substantially

more than the risk attendant to a robbery,[4] the jury could reasonably infer West's movement of Robinson did increase the risk of harm. First, West moved Robinson at gunpoint away from the car, during which movement there was a risk either that the gun could discharge inadvertently, or that Robinson might perceive resistance rather than compliance was his best option for avoiding injury. (*People v. Martinez, supra,* 20 Cal.4th at p. 233 [movement may subject victim to a substantial increase in risk of harm above that inherent in underlying crime where additional dangers arise from victim's foreseeable attempts to escape].) Second, by separating Robinson from his car and moving him to a concealed area, an onlooker who happened upon the car would not have been alerted to the fact a robbery was in progress, thereby reducing the chances police would be called to rescue Robinson from the dangers presented by an armed robbery. (*Ibid.* [movement may subject victim to a substantial increase in risk of harm above that inherent in underlying crime where additional dangers arise from decreased likelihood of detection].) Finally, Robinson himself testified that he tried to ease himself out from his

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4 The Supreme Court decisions we rely on all consider whether the asportation "substantially" increased a victim's risk of harm. However, the statutory crime of kidnapping to commit robbery as codified in section 209, subdivision (b), "does not require that the movement 'substantially' increase the risk of harm to the victim." (*People v. Martinez, supra*, 20 Cal.4th at p. 232, fn. 4.) Instead, the statute only requires the movement "increase" the risk of harm to the victim necessarily present in the intended underlying offense. (§ 209, subd. (b)(2).) Our Supreme Court has not yet expressed its view on the asportation standard now expressed in the statutory language (*People v. Dominguez, supra*, 39 Cal.4th at p. 1150, fn. 5), and some courts have concluded the statute does not require a substantial increase in the risk of harm. (See, e.g., *People v. Ortiz* (2002) 101 Cal.App.4th 410, 414-415.) Because we conclude there is substantial evidence from which the jury could have found the increased risk was substantial here, we need not address, and express no opinion on, the asportation requirement expressed in section 209, subdivision (b).

secluded location to a more open area to increase his chances for survival, but was forced back by West.[5] (*People v. Dominguez, supra*, 39 Cal.4th at p. 1153 [substantial evidence supported verdict of increased risk because the "movement . . . changed the victim's environment from a relatively open area alongside the road to a place significantly more secluded, substantially decreasing the possibility of . . . rescue"].) Although the foregoing dangers did not materialize, that "does not, of course, mean that the risk of harm was not increased." (*Earley, supra*, 14 Cal.3d at p. 132.)

We conclude there was substantial evidence to support the jury's verdict that the movement of Robinson substantially increased the danger of harm to him and was not merely incidental to the robbery.

B. The Telephone Calls Were Properly Admitted

West asserts the court prejudicially erred by admitting the contents of two telephone calls between him and his parents while he was in jail under the adoptive admission exception to the hearsay rule codified in Evidence Code section 1221.

Standards

Evidence Code section 1221 provides that "[e]vidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct

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[5] Robinson testified that, after he was forced to move behind the trash area, he waited a few minutes but then tried to move away from the cans because "where I was located—if he came and shot me, nobody would see me, so I was trying to get in a position that if he was going to try to shoot me, at least I could go somewhere where somebody could actually see me."

manifested his adoption or his belief in its truth." As explained by the court in *People v. Jurado* (2006) 38 Cal.4th 72, 116, "[w]hen a defendant remains silent after a statement alleging the defendant's participation in a crime, under circumstances that fairly afford the defendant an opportunity to hear, understand, and reply, the statement is admissible as an adoptive admission, unless the circumstances support an inference that the defendant was relying on the right of silence guaranteed by the Fifth Amendment to the United States Constitution." Moreover, as *People v. Riel* (2000) 22 Cal.4th 1153 explained:

> " 'For the adoptive admission exception to apply, . . . a direct accusation in so many words is not essential.' [Citation.] 'When a person makes a statement in the presence of a party to an action under circumstances that would normally call for a response if the statement were untrue, the statement is admissible for the limited purpose of showing the party's reaction to it. [Citations.] His silence, evasion, or equivocation may be considered as a tacit admission of the statements made in his presence.' [Citation.]" (*Id.* at p. 1189.)

Riel also explained that " '[t]o warrant admissibility, it is sufficient that the evidence supports a reasonable inference that an accusatory statement was made under circumstances affording a fair opportunity to deny the accusation; whether defendant's conduct actually constituted an adoptive admission becomes a question for the jury to decide.' [Citation.]" (*Id.* at pp. 1189-1190.)

Analysis

The prosecution made a pretrial motion to admit into evidence the contents of telephone calls placed by West while he was in jail on the grounds the calls contained adoptive admissions. During West's conversation with Ms. Baker (his mother), Ms. Baker stated "you done messed up your . . . life. . . . That was stupid to go rob

somebody and showing your face . . . ." West did not deny his involvement, but instead responded that he "might have to fire [West's lawyer] 'cause [the lawyer was] not really for me." During a later conversation between West and Mr. West (West's father), Mr. West stated "you done got your ass in some shit this time," and urged West to "start . . . putting [the blame] on somebody else just like they put it on you" and to "stick to this story it wasn't you," and West neither denied involvement nor insisted "this story" was in fact the truth. West objected to admission of the evidence, asserting his silence could not under the circumstances permit a finding that he adopted the statements.

West asserts the trial court prejudicially erred by admitting those telephone calls into evidence because when a defendant chooses to remain silent in the face of an accusatory statement or question, his or her silence may not be the foundation for admitting the accusatory statement as an adoptive admission where that silence is attributable to defendant's decision to rely on the Fifth Amendment right to silence. He also argues the erroneous admission provided the predicate for additional *Doyle*[6] error because the prosecutor commented on his silence in closing argument. However, many of the authorities relied on by West involved silence in the face of an accusatory statement *made during a custodial interrogation* of the defendant. (See *People v. Cockrell* (1965) 63 Cal.2d 659, 669-670 [while in custody at police station defendant was asked by officer for his response to statement accusing him of selling drugs and defendant remained silent; held error to admit this evidence because "rationale of *Griffin*

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6 *Doyle v. Ohio* (1976) 426 U.S. 610.

implicitly proscribes drawing an inference adverse to the defendant from his failure to reply to an accusatory statement if the defendant was asserting his constitutional privilege against self-incrimination [even] without an express claim of . . . privilege against self-incrimination"]; *U.S. v. Hale* (1975) 422 U.S. 171, 176 ["Failure to contest an assertion . . . is considered evidence of acquiescence only if it would have been natural under the circumstances to object to the assertion in question. . . . But the situation of an arrestee is very different, for he is under no duty to speak and, as in this case, has ordinarily been advised by government authorities only moments earlier that he has a right to remain silent, and that anything he does say can and will be used against him in court. [¶] . . . [¶] Under these circumstances, his failure to offer an explanation during the custodial interrogation can . . . be taken to indicate reliance on the right to remain silent . . . ."]; cf. *Doyle v. Ohio, supra,* 426 U.S. at pp. 617-618 [state may not impeach defendant's exculpatory story at trial by cross-examining the defendant about his failure to give story to officer after receiving *Miranda*[7] warnings at the time of his arrest because "[s]ilence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. . . . While it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial."] [fn. omitted].) Although silence under those

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7 *Miranda v. Arizona* (1966) 384 U.S. 436.

circumstances may not be introduced, West was involved in private conversations that do not involve analogous concerns.

In the cases addressing silence while engaged in private conversations, the courts have adopted a modified approach. In *People v. Eshelman* (1990) 225 Cal.App.3d 1513, the court held "*Doyle* need not apply to defendant's silence invoked [in the presence of] a private party *absent a showing that such conduct was an assertion of his rights to silence and counsel*. [Citation.] On the other hand, when the evidence demonstrates that defendant's silence in front of a private party *results primarily from the conscious exercise of his constitutional rights*, then *Doyle* should apply." (*Id*. at p. 1520.) Thus, in *Eshelman,* the defendant produced *evidence* that one of the reasons he refused to talk was because his attorney had advised him not to speak. (*Id.* at p. 1521.) However, in *People v. Medina* (1990) 51 Cal.3d 870, 890, the Supreme Court held that when the defendant "was engaged in conversation with his own sister, it was not unreasonable to permit the jury to draw an adverse inference from his silence in response to her inquiry as to why he shot the victims. [¶] The record does not suggest that defendant believed his conversation with his sister was being monitored, *or that his silence was intended as an invocation of any constitutional right*." (Cf. *People v. Delgado* (1992) 10 Cal.App.4th 1837 [no *Doyle* error where no evidence that defendant's failure to tell anyone his version of the story was motivated by his desire to invoke his right to silence].) Here, the evidence does not clearly show that West's failure to deny the inculpatory content of his parents' accusatory statements was motivated primarily by his intent to invoke his right to silence or was based on his attorney's advice to remain silent. Accordingly, there was no

error in admitting the evidence or in permitting the prosecutor to comment on West's failure to deny the statements.

West raises two other asserted errors regarding the telephone calls. First, he asserts admission of this evidence was an abuse of discretion because the evidence should have been excluded under Evidence Code section 352 as more prejudicial than probative. However, West cites nothing in the record to suggest Evidence Code section 352 was raised at trial, and therefore this alleged claim of error is not preserved for appeal. (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1014-1015, disapproved on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Champion* (1995) 9 Cal.4th 879, 918, overruled on other grounds by *People v. Combs* (2004) 34 Cal.4th 821, 860.) Second, he asserts the jury instructions were incomplete because, although the jury was correctly instructed with CALCRIM No. 357 on how to determine whether West adopted the parents' statements, the jury was not instructed that the accusatory statements by the parents were not admitted for the truth of the statements but were only admitted to supply meaning to West's silence when he heard the statements. However, West neither objected to the instruction actually given nor requested the modification he now asserts was necessary, which forfeits the claim of error.[8] (*People v. Rundle* (2008) 43 Cal.4th

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8 Even if this claim was preserved, it appears to be without merit. Statements admitted under the adoptive admission exception to the hearsay rule "become, in effect, his statements, and, '[b]eing deemed the defendant's own admissions, we are no longer concerned with the veracity or credibility of the original declarant.' " (*People v. Roldan* (2005) 35 Cal.4th 646, 711, fn. 25, disapproved on other grounds by *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22.) West does not articulate how his argument on appeal can be reconciled with *Roldan*.

76, 151 ["[t]he long-standing general rule is that the failure to request clarification of an instruction that is otherwise a correct statement of law forfeits an appellate claim of error based upon the instruction given"], disapproved on other grounds by *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22.)

Finally, even assuming the evidence should have been excluded, we are convinced any error was harmless beyond a reasonable doubt, because the evidence at most was an admission that West was somehow involved in the robbery. However, West *admitted* to police he was involved, although he claimed his involvement was limited to acting as the lookout. Moreover, he *admitted* to his girlfriend he was involved, stating (during another telephone call recorded by police and admitted into evidence) that he was angry at someone for "put[ting] the pistol in my hand." Finally, Robinson identified West as the gunman, and both Spencer (one of the actual robbers) and Campbell (who was present during the planning and later took the gun from West) testified West was involved. Accordingly, even if admission of the evidence was error, it was harmless beyond a reasonable doubt. (See *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 77.)

C. Denial of the Bifurcation Motion Was Not an Abuse of Discretion

West moved to bifurcate trial of the gang enhancement from trial of the underlying offenses, arguing the question of whether the underlying crimes were committed was distinct from whether the crimes were to aid, promote or assist the gang. The court denied the motion. West asserts the ruling was an abuse of discretion.

Applicable Law

A trial court has discretion to bifurcate trial of issues, including enhancements. (*People v. Calderon* (1994) 9 Cal.4th 69, 74-75.) A defendant seeking bifurcation must " 'clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.' " (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1051 (*Hernandez*), quoting *People v. Bean* (1988) 46 Cal.3d 919, 938.) In *Hernandez,*, the court concluded the decision on whether to bifurcate a gang enhancement allegation differs from whether to bifurcate so-called status allegations, like a prior conviction, because "[a] gang enhancement is different from [a] prior conviction . . . . A prior conviction allegation relates to the defendant's *status* and may have no connection to the charged offense; by contrast, the criminal street gang enhancement is attached to the charged offense and is, by definition, inextricably intertwined with that offense. So less need for bifurcation generally exists with the gang enhancement than with a prior conviction allegation." (*Hernandez,* at p. 1048.) *Hernandez* cautioned it was not holding "that a court should never bifurcate trial of the gang enhancement from trial of guilt. . . . The predicate offenses offered to establish a 'pattern of criminal gang activity' (§ 186.22, subd. (e)) need not be related to the crime, or even the defendant, and evidence of such offenses may be unduly prejudicial, thus warranting bifurcation. Moreover, some of the other gang evidence, even as it relates to the defendant, may be so extraordinarily prejudicial, and of so little relevance to guilt, that it threatens to sway the jury to convict regardless of the defendant's actual guilt." (*Id*. at p. 1049.)

However, *Hernandez* also recognized that cross-admissibility considerations often will obviate issues of prejudice because, even in cases *not* involving a gang enhancement allegation, the evidence of gang membership

> "is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.] To the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of prejudice would be dispelled, and bifurcation would not be necessary." (*Hernandez, supra*, 33 Cal.4th at pp. 1049-1050.)

The ultimate decision to grant bifurcation is within the trial court's discretion and we will not reverse absent an abuse of that discretion. (*People v. Hardy* (1992) 2 Cal.4th 86, 167.)

Analysis

We conclude the trial court did not abuse its discretion by denying West's bifurcation motion because much of the gang evidence would have been cross-admissible (even without the gang enhancement allegation) on a variety of issues, including identity, credibility, motive, and intent. The principal issue was the identities of the persons involved in the robbery. At trial, both Spencer (a co-member with West in the Casa de Oro gang) and Campbell (a member in a gang allied with the Casa de Oro gang) identified West as one of the persons who planned and conducted the robbery. Because the defense sought to impeach these witnesses by showing they had a motive to fabricate, the gang evidence was relevant because it buttressed the credibility of their inculpatory

testimony against West.[9] Alternatively, the gang evidence would be relevant to West's specific intent insofar as the jury could have concluded West was not a direct participant but did (by his own admission to police) aid and abet his fellow gang members in the robbery, a theory of culpability on which the jury was instructed and that was argued by the prosecutor.[10]

Because much of "the evidence supporting the gang enhancement would [have been] admissible at a trial of guilt, any inference of prejudice [is] dispelled, and bifurcation [was] not . . . necessary" to protect West against undue prejudice. (*Hernandez, supra,* 33 Cal.4th at pp. 1049-1050.) Although the evidence actually introduced to prove the enhancement may have been somewhat broader than the gang evidence that would have been admitted had the trial been limited to West's guilt of the

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9 Detective Hartman, a gang expert, testified that a consistent rule among fellow gang members is "you never talk to police, . . . you are not a snitch" and that there is a "code of silence" to protect fellow members. When arguing the jury should credit Spencer's testimony against West, the prosecutor noted that (in addition to other evidence corroborating Spencer) the jury should "think about [Spencer's demeanor [on the witness stand]. Coming in and testifying against [West] was the last thing that he wanted to do. . . . And why? It is exactly what Detective Hartman was talking about earlier. It is the code of silence. . . . Mr. Spencer . . . made a decision [to testify against West] and went against all of the things he learned within his gang culture." Similar considerations were applicable to evaluating Campbell's credibility, particularly insofar as it buttressed Campbell's testimony that West's gang planned the crime at an allied gang member's home.

10 In one version given to police, West claimed his involvement was limited to being a lookout, and that although "robberies weren't normally what he does, . . . since his homies . . . his . . . fellow gang members, asked him to assist, he decided to help out." Evidence of West's gang's involvement, as well as the gang culture of assisting or "back[ing other gang members] up," was therefore cross-admissible as relevant to the prosecution's alternative theory against West.

charged offenses, this does not make denial of the motion an abuse of discretion, because "the countervailing considerations that apply when the enhancement is charged permitted a unitary trial. The evidence [of predicate offenses by other gang members] would certainly not have been admissible at a trial limited to the charged offense, but that evidence was also not particularly inflammatory. Those convictions were offered to prove the charged gang enhancement, so no problem of confusion with collateral matters would arise, and they were not evidence of offenses for which a defendant might have escaped punishment. Any evidence admitted solely to prove the gang enhancement was not so minimally probative on the charged offense, and so inflammatory in comparison, that it threatened to sway the jury to convict regardless of defendants' actual guilt. Accordingly, defendants did not meet their burden 'to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.' [Citation.] The court acted within its discretion in denying bifurcation." (*Hernandez,* at p. 1051.)

Moreover, the court gave a limiting instruction cautioning that the jury could not consider the gang evidence to prove West was a person of bad character or had a disposition to commit crimes, but only for the purposes of determining the truth of the gang enhancement. We presume the jury followed the court's instructions (*People v. Green* (1980) 27 Cal.3d 1, 29, overruled on other grounds by *People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129), which dispels any potential that the jury convicted West based on his gang affiliation rather than on the affirmative evidence admissible to determine his guilt of the substantive offenses.

D. Substantial Evidence Supports the True Finding on the Gang Enhancement

West finally contends the evidence is insufficient to support the jury's verdict finding true the gang enhancement. He asserts there was insufficient evidence either that the offenses were committed (1) for the benefit of or in association with West's gang, or (2) with the specific intent to promote, further or assist in any criminal conduct by West's fellow gang members.

Legal Principles

Section 186.22, subdivision (b), requires proof the crimes were "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ." The first element is whether the crime was committed (1) at the direction of any criminal street gang, or (2) for the benefit of any criminal street gang, or (3) in association with any criminal street gang. The second element is whether the defendant committed the crime with the specific intent to promote, further, or assist in any criminal conduct by gang members.

Our role in considering an insufficiency of the evidence claim is limited. We do not reassess the credibility of witnesses (*People v. Barnes* (1986) 42 Cal.3d 284, 303-304), and we review the record most favorably to the judgment (*People v. Johnson* (1980) 26 Cal.3d 557, 576), drawing all inferences from the evidence that supports the jury's verdict. (*People v. Alcala* (1984) 36 Cal.3d 604, 623.) We must affirm if " '*any* rational trier of fact' " could have been persuaded of the defendant's guilt. (*Johnson*, at p. 576.)

The First Element Is Supported by Substantial Evidence

West contends there is insufficient evidence the crimes were committed "for the benefit of, at the direction of, or in association with" a criminal street gang, because the evidence does not provide any basis for not concluding the crimes were committed for personal gain rather than to benefit the gang. However, the evidence clearly showed West committed the crime in association with fellow gang members, both in its planning and execution, which the court in *People v. Morales* (2003) 112 Cal.App.4th 1176 concluded was sufficient to satisfy the first element of the enhancement. As *Morales* explained at page 1198:

> "Defendant argues that reliance on evidence that one gang member committed a crime in association with other gang members is 'circular . . . .' Not so. Arguably, such evidence alone would be insufficient, even when supported by expert opinion, to show that a crime was committed for the *benefit* of a gang. The crucial element, however, requires that the crime be committed (1) for the benefit of, (2) at the direction of, *or* (3) in *association* with a gang. Thus, the typical close case is one in which one gang member, acting alone, commits a crime. Admittedly, it is conceivable that several gang members could commit a crime together, yet be on a frolic and detour unrelated to the gang. Here, however, there was no evidence of this. Thus, the jury could reasonably infer the requisite association from the very fact that defendant committed the charged crimes in association with fellow gang members."

Although West argues this construction of the type of evidence that satisfies the "in association with" aspect of the first element is wrong, other courts have adopted a similar approach (see *People v. Leon* (2008) 161 Cal.App.4th 149, 162-163; *People v Martinez* (2008) 158 Cal.App.4th 1324, 1331-1334), and we are unpersuaded by West's argument for ignoring this interpretation of the enhancement. Moreover, even if some

additional evidence was necessary to strengthen the inference that a crime committed with fellow gang members was "in association with" West's gang, the evidence here—that the robbers referred to each other by gang slang during the robbery (referring to each other as "Blood"), West admitted he agreed to participate to support his "homies," and Campbell admitted he took the gun from West and cleaned and hid it to help his fellow gang members avoid arrest—provides sufficient evidence from which a rational trier of fact could conclude the crimes were committed in association with West's gang rather than for personal gain unrelated to West's gang.

The Second Element Is Supported by Substantial Evidence

West also asserts the evidence is insufficient to support the specific intent element because he interprets the enhancement to require a specific intent beyond the intent to aid in committing the charged offenses. Relying on *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099, West asserts the specific intent element must be the specific intent to aid separate criminal conduct by the gang *apart from the charged offenses*.

Although West correctly reads *Garcia*, California courts have rejected that interpretation. For example, in *People v. Hill* (2006) 142 Cal.App.4th 770, 774, the court held that for purposes of section 186.22, subdivision (b), the prosecutor must establish "specific intent to promote, further, or assist in *'any* criminal conduct by gang members,' " but there was no requirement that the defendant's intent relate to criminal activity apart from the charged offenses. In *People v. Morales*, *supra*, 112 Cal.App.4th 1176, 1198, and again in *People v. Romero* (2006) 140 Cal.App.4th 15, 19, the courts also held that evidence the defendant intended to commit the charged offenses with his

fellow gang members was sufficient to satisfy the specific intent requirement of section 186.22, subdivision (b). The *Romero* court specifically rejected *Garcia's* construction of section 186.22, subdivision (b) because "[b]y its plain language, the statute requires a showing of specific intent to promote, further, or assist in '*any* criminal conduct by gang members,' rather than *other* criminal conduct." (*Romero*, at p. 19; accord, *People v. Hill*, *supra*, 142 Cal.App.4th at p. 774 [concluding *Garcia* "misinterprets California law"].)

West asserts our Supreme Court's decision in *People v. Gardeley* (1996) 14 Cal.4th 605, as well as other appellate court cases,[11] demonstrates *Garcia* rather than *Hill* and *Romero* correctly construed the specific intent element of section 186.22, subdivision (b). However, *Gardeley* is irrelevant because the *Gardeley* court was neither presented with (nor did it decide) whether the specific intent element of the statute was satisfied *only* by proof of an intent to aid criminal activity apart from the charged offenses.

There was sufficient evidence from which a rational trier of fact could have concluded West had the specific intent to aid in the crimes committed against Robinson, and West does not contend otherwise. Accordingly, we reject West's claim that there was

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11 Specifically, West cites *People v. Augborne* (2002) 104 Cal.App.4th 362, *People v. Gamez* (1991) 235 Cal.App.3d 957 (disapproved on other grounds by *People v. Gardeley*, *supra*, 14 Cal.4th at p. 624, fn. 10), and *People v. Ortiz* (1997) 57 Cal.App.4th 480, as supporting his claim that *Garcia* correctly held the specific intent element requires proof the defendant intended to aid separate criminal conduct by the gang apart from the charged offenses. Those cases do not undermine our conclusion that *Garcia* incorrectly construed California law.

insufficient evidence to support the true finding on the section 186.22, subdivision (b), enhancement.

DISPOSITION

The judgment is affirmed.

McDONALD, J.

WE CONCUR:

HUFFMAN, Acting P. J.

HALLER, J.